



Subject Nationwide Evaluations for Projects with
Minor Section 4(f) Involvements Date DEC 23 1986

From Director, Office of Environmental Policy
Washington, D.C. 20590 Reply to
Attn of HEV-11

To Regional Federal Highway Administrators
Regions 1-10
Direct Federal Program Administrator

Attached are two approved nationwide Section 4(f) evaluations. One covers projects that use minor amounts of land from public parks, recreation areas and wildlife and waterfowl refuges. The other covers projects which use minor amounts of land from historic sites. While a notice on the approval of these documents will be published in the Federal Register, they are effective on the approval date and may be used immediately.

We provided you with the draft evaluations with our January 6, 1986, memorandum. We also requested public comment on the draft evaluations by means of a January 7, 1986, Federal Register notice. We received over 100 comments. Many State transportation agencies commented, with all but one endorsing the proposed nationwide evaluations. Several environmental organizations expressed serious objections to the nationwide evaluations. After carefully considering all of the comments, we have developed what we feel is a workable and time saving mechanism for assuring Section 4(f) compliance. We are also attaching a copy of the preamble to the Federal Register notice so that you can understand how these comments were dealt with.

While the actual application of the nationwide evaluations to individual projects will be done by the Division Offices, your environmental staff will play a critical role in assuring that the Divisions understand how to properly apply the evaluations. To assuage the fears of the organizations that opposed the approval of the nationwide evaluations we have pledged to systematically monitor their use. We anticipate that your office will take the lead in this effort.

We look forward to your feedback on how widespread the use of these new nationwide Section 4(f) evaluations is, and of what problems are encountered in applying the evaluations.

Ali F. Sevin

3 Attachments

[4910-22]

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

NATIONWIDE SECTION 4(f) EVALUATIONS AND APPROVALS FOR FEDERALLY-AIDED HIGHWAY PROJECTS WITH MINOR INVOLVEMENT WITH PUBLIC PARKS, RECREATION LANDS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: The FHWA has approved two nationwide Section 4(f) evaluations. The first one covers federally assisted highway projects which use minor amounts of land from publicly owned public parks, recreation areas, and wildlife and waterfowl refuges. The second covers federally assisted highway projects which use minor amounts of land from historic sites which are on or are eligible for inclusion on the National Register of Historic Places. These programmatic evaluations can be applied to individual projects with similar fact patterns. Utilization of nationwide programmatic evaluations can streamline the processing of qualifying projects by eliminating a certain amount of project-by-project internal review and interagency coordination.

FOR FURTHER INFORMATION CONTACT: Mr. Frederick Skaer, Office of Environmental Policy, Room 3232, (202) 366-2050; Mr. Harold Aikens, Office of the Chief Counsel, Right-of-Way and Environmental Law Division, Room 4230, (202) 366-1373, FHWA, DOT, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are 7:45 a.m. to 4:15 p.m., ET, Monday through Friday.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Federally aided highway projects that propose to use land from significant publicly owned public parks, recreation areas, and wildlife and waterfowl refuges, or from significant historic sites are subject to Section 4(f) of the DOT Act,¹ which prohibits such use unless (1) there are no feasible and prudent alternatives and (2) all possible planning to minimize harm has occurred. To demonstrate that these conditions are met, FHWA requires that appropriate analyses and coordination be undertaken.

It was FHWA's practice in the years following the passage of Section 4(f) to present these analyses and coordination for every project in a document known as an individual Section 4(f) evaluation. In approving the individual Section 4(f) evaluation for a project, FHWA made a finding that the statutory provisos of Section 4(f) had been complied with.

After many years of processing projects with individual Section 4(f) evaluations, it became apparent that many projects had similar fact patterns from a Section 4(f) standpoint. This situation gave rise to the concept of a programmatic Section 4(f) evaluation. Under the programmatic concept, a given project scenario is evaluated from a Section 4(f) perspective. Development of this evaluation is not based on any particular project, but on experience gained from processing many projects that had a fact pattern similar to that

¹ Section 4(f), Pub. L. 86-670, 80 Stat. 934 was repealed by Pub. L. 97-449, 96 Stat 2444 and recodified at 49 U.S.C. 303. Because of common usage and familiarity, the term Section 4(f) continues to be used by the Department of Transportation in matters relating to 49 U.S.C. 303.

assumed in the scenario. The programmatic evaluation is applied to a project by comparing the project facts with those established in the programmatic evaluation. If the project facts fall within the applicability criteria of the programmatic evaluation and if the specific conditions contained in the programmatic are met, (e.g., coordination, mitigation), then the statutory requirements of Section 4(f) are met, i.e., there are no feasible and prudent alternatives and all possible planning to minimize harm has occurred. If the project facts do not fall within the applicability criteria of the programmatic evaluation or if any of the conditions of the programmatic are not met, then an individual Section 4(f) evaluation is required.

The FHWA first utilized the programmatic approach in 1977 with a programmatic Section 4(f) evaluation for bikeway projects, and subsequently in 1979 and 1983 with programmatic Section 4(f) evaluations for Great River Road projects and projects involving historic bridges, respectively. In 1984, the FHWA Region 1 office issued a regionwide programmatic Section 4(f) evaluation for projects requiring minor amounts of parkland. Since then it has been applied about 20 times. In 1985, representatives from FHWA, the Office of the Secretary of Transportation, and the U.S. Department of Interior (DOI) field reviewed several of the projects processed with the Region 1 programmatic evaluation and determined that the procedure was achieving its goal of expediting the projects without jeopardizing the values protected by Section 4(f).

The two nationwide programmatic Section 4(f) evaluations published with this notice, one for highway projects using minor

amounts of lands from publicly owned public parks, recreation areas, and wildlife and waterfowl refuges, the other for highway projects using minor amounts of land from historic sites, are an extension of the Region 1 programmatic Section 4(f) evaluation. In addition to extending the geographic applicability to cover the entire Nation, the nationwide evaluations extend the Section 4(f) resources covered to include wildlife and waterfowl refuges and historic sites.

NEW NATIONWIDE SECTION 4(f) EVALUATION

The fact patterns established for these new nationwide Section 4(f) evaluations are very similar. This is why they are published in the same notice. The essential factual criteria are as follows: (1) the project entails an improvement of an existing highway, (2) the impacts of the highway project on the Section 4(f) property are minor, and (3) the officials with jurisdiction over the property have agreed with the assessment of impacts and the proposed mitigation. All of these facts must be established for a project to be processed using either of these nationwide Section 4(f) evaluations.

The use of a nationwide Section 4(f) evaluation does not mean that the project will escape a close scrutiny under Section 4(f). The FHWA Division Administrator will apply the appropriate Section 4(f) evaluation to a project only after assuring and documenting that the project meets the applicability criteria provided in the nationwide evaluation, that alternatives to the use of the Section 4(f) land have been fully considered, and that mitigation measures consistent with agreements with the official(s) with jurisdiction over the Section 4(f) property have been incorporated into the project planning.

It is important to note that a project failing to comply with Section 4(f) if processed with an individual Section 4(f) evaluation would also fail under the nationwide Section 4(f) evaluations.

WHY ISSUE THESE NATIONWIDE SECTION 4(f) EVALUATIONS?

The FHWA approves approximately 120 individual Section 4(f) evaluations each year. Each approval is based on extensive internal review and interagency coordination. The internal review consists of a review by the FHWA Division Office, Regional Office and sometimes the Headquarters Office. In addition to this review by the FHWA environmental program managers, each individual Section 4(f) evaluation undergoes a separate review by FHWA counsel to ensure legal sufficiency. Interagency coordination is undertaken on all individual Section 4(f) evaluations with the official(s) with jurisdiction over the Section 4(f) land, and with the DOI. In addition, on projects involving Section 4(f) lands for which they have program responsibilities, the U.S. Departments of Agriculture (USDA) and Housing and Urban Development (HUD) are consulted.

The above process of review and consultation is comprehensive but time consuming. Nevertheless, it is appropriate for projects that substantially impair the functions of Section 4(f) lands. On many projects, however, the Section 4(f) lands are not substantially impaired. Project impacts on Section 4(f) lands are sometimes minor, with no controversy between FHWA and the official(s) with jurisdiction, with no apparent feasible and prudent alternative, and with substantial or complete mitigation provided. It is these projects that the new nationwide Section 4(f) evaluations address.

The nationwide Section 4(f) evaluations streamline the processing of qualifying projects by eliminating a certain amount of project-by-project internal review and interagency coordination. As established in the nationwide evaluations, the FHWA Division Administrator will review the facts of a project and determine if the nationwide Section 4(f) evaluation can be applied. If it can, then appropriate documentation is placed in the project file. The project is not reviewed by a higher level FHWA office. Similarly, interagency coordination is streamlined by consulting only with the official(s) with jurisdiction and not with DOI, USDA, or HUD (unless the Federal agency has a specific action to take, such as DOI approval of a conversion of land acquired using Land and Water Conservation Funds). The time savings that result from the streamlining steps outlined above will typically amount to 3-6 months and sometimes will result in a project being built during one construction season rather than the next. Equally important, the extent of internal review and interagency coordination is made more commensurate with the severity of impacts and lack of alternatives.

ACTIONS TAKEN TO DATE

The draft nationwide Section 4(f) evaluations were published on January 7, 1986, at 51 FR 697 requesting public and agency comment (Docket No. 86-2). In addition, copies of the draft evaluations were sent to various Federal agencies and national organizations for comment.

After careful analysis of all comments received, FHWA decided to finalize and approve these nationwide Section 4(f) evaluations. This

decision was based upon the belief that the nationwide evaluations will assure full compliance with the statutory requirements of Section 4(f) while at the same time reducing duplicative administrative processing and delays for eligible projects.

COMMENTS AND RESPONSES ON THE DRAFT NATIONWIDE SECTION 4(f) EVALUATIONS

Ninety-eight responses to the request for comments were received. Of these, 72 generally supported the proposal, 23 opposed it, and 3 took no specific position, but raised questions for clarification. The respondents included 5 Federal agencies, 11 national organizations, 38 State transportation agencies, 3 State natural resource agencies, 29 local public works departments, 7 local associations, 4 individuals, and 1 petition.

Those opposing the proposal cited various reasons. The most frequently stated bases for opposition are summarized below, followed by a response:

Comment: The programmatic mechanism is illegal.

Response: The statute does not require any particular form of documentation. The FHWA Chief Counsel has evaluated the two nationwide Section 4(f) evaluations and determined that they comply with applicable statutory requirements, and with case law, i.e., they allow a determination as to whether there is a feasible prudent alternative and that there has been all possible planning to minimize harm. The mechanism is very similar to programmatic environmental evaluations conducted under the National Environmental Policy Act,

e.g., categorical exclusions and programmatic Findings of No Significant Impacts. The courts have repeatedly upheld such programmatic evaluations.

Comment: The proposed nationwide evaluations would reduce the effectiveness of Section 4(f) by making it easier to use Section 4(f) lands.

Response: While the nationwide evaluations will allow projects to be processed with fewer delays, the statutory tests that a project must pass if processed with a nationwide evaluation are identical to those applied for an individual Section 4(f) evaluation.

Comment: A programmatic evaluation is no substitute for project-by-project review.

Response: The programmatic evaluations lay out certain uniform conditions and findings, however, they do not eliminate a project-by-project review of the appropriateness of applying these conditions and findings. Each project will be reviewed to assure that the conditions are satisfied. This review will be comprehensive, including an analysis of alternatives, impacts and mitigation.

Comment: The programmatic mechanism provides insufficient opportunity for public input on individual projects.

Response: The public involvement activities employed on a project are prescribed in FHWA approved State public involvement procedures. Such procedures typically base the level of public involvement on the environmental class of action and on other factors which reflect the severity of impacts and the degree of public interest. Section 4(f) does not require any public involvement. Therefore, the use of a programmatic evaluation will not affect the type of public involvement

activities undertaken for a project. However, project specific documentation supporting the use of the nationwide evaluation would be available to members of the public upon request.

Several commenters expressed reservations regarding the ability of the official(s) with jurisdiction over the Section 4(f) land to adequately protect it, and the FHWA's ability to implement the nationwide evaluations as intended. Both of these points will be the subject of systematic program monitoring to assure that officials with jurisdiction are fully aware of the process and that FHWA and State transportation agency offices are properly utilizing the process.

One State transportation agency opposed the nationwide evaluations on the grounds that they gave the officials with jurisdiction too much authority. It is important to keep in mind that a major premise upon which these nationwide evaluations are based is that the officials with jurisdiction agree with the assessment of impacts and the mitigation proposed. This does not obligate the State transportation agency or the FHWA to modify its impact assessment or mitigation proposal if it feels that the position of the official with jurisdiction is unreasonable. It does, however, mean that agreement has not been reached and that an individual Section 4(f) evaluation is required.

Several commenters requested that FHWA provide guidance on which nationwide evaluation to use when a project fits within the applicability criteria of more than one of the nationwide evaluations. For example, a project involving a park that is also historic could qualify under either the nationwide evaluation for parks, etc., or the nationwide evaluation for historic sites. In such a case the project

should meet the applicability criteria and other conditions for both nationwide evaluations in order to be processed using a programmatic approach.

Another situation for which clarification was requested was the relationship between the nationwide evaluation for historic sites and the nationwide Section 4(f) evaluation for historic bridges issued in 1983. A project may require the use or demolition of an historic bridge and may also use land from an historic site. If the historic bridge and the historic site are separable, then both programmatic Section 4(f) evaluations should be utilized independently on the separate parts of the project. If the historic bridge is the historic site, then the nationwide evaluation for historic bridges should be used. The use of the land would in this instance be incidental to the use of the structure itself.

One commenter noted the possibility of avoiding minor Section 4(f) involvements with historic sites altogether by establishing historic boundaries more carefully or by revising boundaries that were arbitrarily set. The FHWA supports such actions but recognizes that boundary revisions are sometimes difficult to accomplish. In such cases the use of historically non-contributing elements from the historic site is best handled by applying the nationwide Section 4(f) evaluation for historic sites.

Two commenters questioned whether Section 4(f) should apply at all to situations where either a "no-effect" or "no adverse effect" determination is made pursuant to the process for review of effects on historic properties under Section 106 of the National Historic

Preservation Act and 36 CFR Part 800 (the Section 106 Process). They reasoned that since the undertaking does not impair the historic integrity of the site, it does not "use" it within the meaning of Section 4(f). Such an interpretation is not consistent with interpretations of Section 4(f) by the courts, which have determined that the physical occupancy of land from an historic site is a "use" under Section 4(f) except in certain cases involving historic transportation facilities.

SECTION BY SECTION ANALYSIS

Many changes to particular sections of the nationwide evaluations were suggested. Many of these comments are discussed below. Most of the comments applied equally to both of the nationwide evaluations. Where only the nationwide evaluation for parks, etc., or the nationwide evaluation for historic sites is affected, a reference to this effect is made.

The DOI undertook a comprehensive review of the nationwide evaluations and commented on virtually all of the sections. Most of the comments offered alternative wording to enhance the understandability and workability of the nationwide evaluations. The FHWA has adopted most of the DOI's suggestions.

Introduction

This section has been edited to remove unnecessary verbiage and to emphasize that the project specific analyses conducted in support of the use of the nationwide evaluation should be compiled into a single document.

Applicability

Several commenters suggested modifying the paragraph describing the types of projects for which the nationwide evaluations could be used. Some felt that projects that substantially increase the capacity of the highway should be excluded as should projects processed with an environmental impact statement (EIS). Others felt that projects to be built on new location should qualify. The FHWA has reviewed the positions carefully and decided to maintain essentially the same requirements contained in the draft. To allow projects on new location would introduce a new scenario not contemplated in the development of these nationwide evaluations. To prohibit projects that substantially increase capacity would place unnecessary restrictions on the use of the nationwide evaluations. Such projects are within the contemplated scenario of improving an existing highway adjacent to Section 4(f) lands. Substantial capacity increases need not translate into substantial impacts to the Section 4(f) lands. If the impacts are more than minor, then these nationwide evaluations cannot be used, regardless of whether or not the highway capacity is increased.

Regarding whether the nationwide evaluations can be used on projects processed with an EIS, FHWA has decided against an outright prohibition, while recognizing that in the vast majority of cases use of the nationwide evaluations would be inappropriate. It would be inappropriate in that since an individual Section 4(f) evaluation is incorporated into the EIS, no additional coordination requirements are imposed nor should project delays result from the preparation of the individual Section 4(f) evaluation. On the other hand, there may be

cases where Section 4(f) lands are identified late in the process, after a final EIS has been approved. In such cases the use of the nationwide evaluations would be appropriate, provided that the applicability criteria are met. These considerations have been incorporated into a new applicability criterion.

One commenter requested that FHWA clarify what is meant by a "highway on new location" since many projects involve sections of highway on new location and sections on the existing location. Insofar as the nationwide evaluations are concerned, the nature of the highway in the vicinity of the Section 4(f) lands is critical. If the highway can be characterized as being planned on new location through the Section 4(f) lands, then the nationwide evaluations cannot be used.

Many commenters addressed the provision in the nationwide evaluation for historic sites that defined "minor" as meaning "no effect" or "no adverse effect" as defined in the Section 106 regulation. Several persons correctly noted that the Advisory Council for Historic Preservation (ACHP) was considering eliminating the "no adverse effect" category. Since then, the ACHP has finalized its new regulation and has retained the "no adverse effect" determination.

Several commenters felt that the nationwide evaluation for historic sites should also apply to cases with a small or mitigated adverse effect. After careful consideration of how this might be accomplished and its ramifications, FHWA has decided to limit the use of the programmatic evaluation to "no effect" and "no adverse effect."

One commenter suggested defining "minor" totally independently of the determinations of effect made pursuant to the Section 106 process. Given the similarity between the determinations of effect and the concept of minor impact, FHWA has opted for the administrative simplicity of tying the two together for purposes of this nationwide evaluation.

One commenter suggested that the applicability criteria for the nationwide evaluation for historic sites be modified to allow the use of non-contributing elements, such as, modern buildings and appurtenances. The FHWA views this suggestion as being entirely consistent with the intent of the programmatic evaluation and has adopted it by rewording the applicability criteria to exclude only the removal or alteration of the historic elements (buildings, structures, or objects) of a site.

One commenter questioned whether or not the nationwide evaluation for historic sites applied also to archeological sites. Our intention is to have the evaluation apply only to archaeological resources located within the boundary of the historic site in question and only if the archaeological resources are not important for preservation in place. The applicability criteria have been modified to reflect this intent.

Another commenter indicated that the nationwide evaluation for historic sites should apply in historic districts provided that all other conditions have been met. The FHWA has long taken the position that Section 4(f) applies only to contributing elements in a historic district. As such, the district is viewed as a collection of

individual sites. Given this approach, the nationwide evaluation could be used provided the impacts on the contributing elements within the district are minor, i.e., there is "no effect" or "no adverse effect" under the Section 106 process and the Section 4(f) involvement is limited to the use of land or non-historic improvements.

Numerous comments were received regarding the provisions in the nationwide evaluation for parks, etc., that dealt with what constitutes a minor use. Of particular concern was the provision that precluded utilizing the nationwide evaluation if the project's use of Section 4(f) lands exceeded the lesser of 1 acre and 10 percent of the Section 4(f) lands. Many State transportation agencies, particularly from western States, indicated that minor strip takes from extremely large Section 4(f) lands could easily exceed the 1 acre limitation. Several commenters felt that the limitation was arbitrary and redundant since other factors adequately defined what constitutes a minor use. While there is no doubt that the limitation was somewhat arbitrarily set, FHWA has decided to maintain a numerical limitation to assure that the other criteria defining minor use are not too broadly construed. In recognition of the concern expressed by the western States, the limitation has been raised from 1 acre to 1 percent of the Section 4(f) lands, for Section 4(f) lands greater than 100 acres.

One commenter asked whether the acreage limitations apply on a per project or per site basis. They would be applied separately for each Section 4(f) site.

In response to a suggestion, the paragraphs in the nationwide evaluation for parks, etc. dealing with the effects of the land taking and the project impacts on the Section 4(f) lands have been revised. This revision makes it clear that in addition to the functions of Section 4(f) lands not being directly impaired by physical taking of land, the proximity impacts of the highway must not impair the functions of the remaining Section 4(f) lands.

One commenter suggested that "use" be explicitly defined as including "constructive use." The FHWA considers constructive use to occur only when the functions of the Section 4(f) lands are substantially impaired. Situations involving substantial impairment of the Section 4(f) lands are clearly ineligible for the nationwide evaluations.

Several commenters were troubled by the provision requiring that the official(s) with jurisdiction over the Section 4(f) lands agree in writing with the assessment of impacts and the proposed mitigation. They felt that this would allow such officials to hold the project up until they got exactly what they wanted. The nationwide evaluations assure that the pertinent parties are in agreement. If this is not the case, an individual Section 4(f) evaluation is the correct mechanism for processing the project.

In response to a comment, the paragraph in the nationwide evaluation for parks, etc., dealing with the conversion of lands for which Land and Water Conservation Funds have been employed has been broadened to take into account other similar laws and Federal agencies in addition to the DOI. In carrying out this provision, the FHWA and

the State transportation agency must make every effort to identify any Federal encumbrances on the Section 4(f) lands. A statement has been added to clarify that the nationwide evaluation cannot be used if the affected agency objects to the proposed land conversion or transfer. The FHWA believes that if there is an objection that cannot be resolved through additional coordination, then the potential for serious problems is sufficiently great that an individual Section 4(f) evaluation is warranted.

One commenter noted that the DOI routinely approves Land and Water Conservation Fund conversions but that the process usually takes a long time. The nationwide evaluation does not require that the DOI approve the conversion, only that it take a position. In those States where a State agency takes an active role in approving Land and Water Conservation Fund conversions, an arrangement may be worked out for DOI to delegate its coordination role to the State.

Alternatives

One commenter felt that the consideration of alternatives on new location that avoid the Section 4(f) lands was in most cases a meaningless exercise. Another commenter remarked that the "full evaluation" of alternatives implied a rigor that is not warranted in most cases. Notwithstanding these comments, this section has been kept essentially unchanged from the draft. The degree of evaluation of avoidance alternatives will vary on a project-by-project basis and will depend upon how much information is needed to support the finding that the avoidance alternatives are not prudent and feasible. Where the disadvantages of the avoidance alternatives are self-evident, less analysis will be required than where they are more subtle.

Findings

As suggested by one commenter, the findings in this section have been restructured to be more straightforward. That the avoidance alternatives are accompanied by unique problems, unusual factors or impacts of extraordinary magnitudes is explicitly stated at the close of each finding. A modifying phrase has been included to recognize that these problems, factors and impacts are not considered in a vacuum, but rather in light of the degree of use of the Section 4(f) lands by the highway project. This approach is consistent with FHWA's practice of considering the magnitude of the Section 4(f) impact when addressing the question of feasibility and prudence of avoidance alternatives for individual Section 4(f) evaluations.

Measures to Minimize Harm

Two commenters were uncertain whether all of the mitigation measures listed in the draft nationwide evaluation for parks, etc., were required to be implemented. In response, this section has been reorganized to clarify that one or more of the mitigation measures listed must be included in the project. The exact mitigation package would be worked out in cooperation with the official(s) with jurisdiction over the Section 4(f) lands. In any event, the mitigation would have to minimize project impacts and be a reasonable public expenditure in light of the severity of the impact and the expected benefits of the mitigation.

Several of the mitigation items have been modified in response to comments made. In particular, the item covering highway design features has been expanded to include examples and to indicate that

the flexible application of AASHTO Standards should be exercised, provided that traffic safety is not compromised.

A new item has been added to recognize that monetary payments are sometimes made in lieu of, or in addition to, other forms of mitigation.

Coordination

One commenter requested that the programmatic evaluation for parks, etc., be modified to contain a mechanism for determining the existence of Federal encumbrances to non-Federal lands. In response, a requirement has been added that the State or local official with jurisdiction be asked to identify any Federal encumbrances. In addition, for those lands likely to have been acquired or improved with Federal funds, we recommend that FHWA or SHA representatives telephone the appropriate Federal agency to verify the possibility of a Federal encumbrance existing.

At the request of the DOI, specific instructions have been included in the nationwide evaluation for parks, etc., regarding coordination with the Department's various bureaus.

The paragraph dealing with coordination with the Coast Guard has been modified to underscore that this coordination should take place before the nationwide evaluation is applied to projects requiring individual bridge permits. In practice, the FHWA should coordinate with the Coast Guard as soon as possible after determining that the conditions are right for applying one of the nationwide evaluations.

The ACHP requested that the nationwide evaluation for historic sites be modified to better reflect coordination with the ACHP under the Section 106 regulations. Rather than repeat the coordination procedures contained in the Section 106 regulations, the final nationwide evaluation specifies that successful completion of this coordination is a condition of using the nationwide evaluation. References have been added to the sections on Applicability and Measures to Minimize Harm to further highlight the ACHP's role.

Several commenters addressed the provision in the nationwide evaluation for historic sites that covered coordination with other groups such as a local historical society and with the property owner. One commenter suggested adding indian tribes to the list. Another suggested making coordination with a private property owner optional. Another requested guidance concerning how to handle disagreements between a private property owner and the SHPO. The 106 regulations indicate the points in the process where "interested persons" should be consulted. Rather than duplicating these procedures the final nationwide evaluation for historic sites references the 106 regulations and encourages coordination with interested persons.

Procedures

This section has been moved to the end of each nationwide evaluation in recognition of its integrative function.

Several commenters expressed doubts as to the level of documentation and the paper flow involved in using the nationwide evaluations. Documentation should be roughly equivalent in detail to that produced for an individual Section 4(f) evaluation. It should

demonstrate that the applicability criteria for nationwide evaluation have been met, that avoidance alternatives have been evaluated, that the findings contained in the nationwide evaluation fit the project facts, and that appropriate mitigation measures have been included. It should also include correspondence demonstrating that the official(s) with jurisdiction over the Section 4(f) lands agree with the assessment of impacts and with the proposed mitigation measures. This documentation should be self-contained and self-explanatory since it will be available to the public upon request. Where an environmental assessment (EA) is prepared for a project, the EA should state that Section 4(f) requirements will be complied with by applying a nationwide evaluation.

The paper flow between the State transportation agency and the FHWA Division Office can be as simple as an exchange of letters and supporting documentation.

(49 U.S.C. 303; 23 U.S.C. 138; 49 CFR 1.48(b))

(Catalog of Federal Domestic Assistance Number 20.205, Highway Research, Planning and Construction)

Issued on:

R. A. Barnhart
Federal Highway Administrator

U.S. Department of Transportation
Federal Highway Administration

FINAL NATIONWIDE SECTION 4(F) EVALUATION AND APPROVAL FOR
FEDERALLY-AIDED HIGHWAY PROJECTS WITH MINOR INVOLVEMENTS
WITH HISTORIC SITES

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of land (including non-historic improvements thereon) from historic sites that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects. (Note: a similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges).

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

Applicability

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation, and reconstruction); safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment; and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.
2. The historic site involved is located adjacent to the existing highway.
3. The project does not require the removal or alteration of historic buildings, structures or objects on the historic site.
4. The project does not require the disturbance or removal of archeological resources that are important to preserve in place rather than to recover for archeological research. The determination of the importance to preserve in place will be based on consultation with the State Historic Preservation Officer (SHPO) and, if appropriate, the Advisory Council on Historic Preservation (ACHP).
5. The impact on the Section 4(f) site resulting from the use of the land must be considered minor. The word minor is narrowly defined as having either a "no effect" or "no adverse effect" (when applying the requirements of Section 106 of the National Historic Preservation Act

and 36 CFR Part 800) on the qualities which qualified the site for listing or eligibility on the National Register of Historic Places. The ACHP must not object to the determination of "no adverse effect."

6. The SHPO must agree, in writing, with the assessment of the impacts of the proposed project on and the proposed mitigation for the historic sites.

7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS.

Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

Alternatives

The following alternatives avoid any use of the historic site.

1. Do nothing.
2. Improve the highway without using the adjacent historic site.
3. Build an improved facility on new location without using the historic site.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. Do Nothing Alternative. The Do Nothing Alternative is not feasible and prudent because: (a) it would not correct existing or projected capacity deficiencies or (b) it would not correct existing safety hazards; or (c) it would not correct existing deteriorated conditions and maintenance problems; and (d) not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.

2. Improvement without Using the Adjacent Section 4(f) Lands. It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in: (a) substantial adverse community impacts to adjacent homes, businesses or other improved properties; or (b) substantially increased roadway or structure cost; or (c) unique engineering, traffic, maintenance, or safety problems; or (d) substantial adverse social, economic, or environmental impacts; or (e) the project not meeting identified transportation needs; and (f) the impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American

Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

3. Alternatives on New Location

It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because (a) the new location would not solve existing transportation, safety, or maintenance problems; or (b) the new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands); or (c) the new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); and (d) such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. Measures to minimize

harm will consist of those measures necessary to preserve the historic integrity of the site and agreed to, in accordance with 36 CFR Part 800 by the FHWA, the SHPO, and as appropriate, the ACHP.

Coordination

The use of this programmatic evaluation and approval is conditioned upon the satisfactory completion of coordination with the SHPO, the ACHP, and interested persons as called for in 36 CFR Part 800. Coordination with interested persons, such as the local government, the property owner, a local historical society, or an indian tribe, can facilitate in the evaluation of the historic resource values and mitigation proposals and is therefore highly encouraged.

For historic sites encumbered with Federal interests, coordination is required with the Federal agencies responsible for the encumbrances.

Before applying this programmatic evaluation to projects requiring an individual bridge permit, the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

Approval Procedure:

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;

3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of land from or non-historic improvements on the historic site) are clearly applicable to the project;


4. Determined that the project complies with the Measures to Minimize Harm section of this document;

5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;

6. Assured that the measures to minimize harm will be incorporated in the project; and

7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on: 12/23/86

Approved: 

Ali F. Sevin, Director
Office of Environmental Policy
Federal Highway Administration

U.S. Department of Transportation
Federal Highway Administration

FINAL NATIONWIDE SECTION 4(F) EVALUATION AND APPROVAL
FOR FEDERALLY-AIDED HIGHWAY PROJECTS WITH MINOR INVOLVEMENTS
WITH PUBLIC PARKS, RECREATION LANDS, AND WILDLIFE AND
WATERFOWL REFUGES

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects. (Note: a similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of land from historic sites).

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

Applicability

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation, and reconstruction); safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment; and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.
2. The Section 4(f) lands are publicly owned public parks, recreation lands, or wildlife and waterfowl refuges located adjacent to the existing highway.
3. The amount and location of the land to be used shall not impair the use of the remaining Section 4(f) land, in whole or in part, for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented in relation to the size, use, and/or other characteristics deemed relevant.

The total amount of land to be acquired from any Section 4(f) site shall not exceed the values in the following Table:

<u>Total Size of Section 4(f) Site</u>	<u>Maximum to Be Acquired</u>
< 10 acres	10 percent of site
10 acres - 100 acres	1 acre
> 100 acres	1 percent of site

4. The proximity impacts of the project on the remaining Section 4(f) land shall not impair the use of such land for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented with regard to noise, air and water pollution, wildlife and habitat effects, aesthetic values, and/or other impacts deemed relevant.

5. The officials having jurisdiction over the Section 4(f) lands must agree, in writing, with the assessment of the impacts of the proposed project on, and the proposed mitigation for, the Section 4(f) lands.

6. For projects using land from a site purchased or improved with funds under the Land and Water Conservation Fund Act, the Federal Aid in Fish Restoration Act (Dingell-Johnson Act), the Federal Aid in Wildlife Act (Pittman-Robertson Act), or similar laws, or the lands are otherwise encumbered with a Federal interest (e.g., former Federal surplus property), coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. The programmatic Section 4(f) evaluation does not apply if the agency objects to the land conversion or transfer.

7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS. Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

Alternatives

The following alternatives avoid any use of the public park land, recreational area, or wildlife and waterfowl refuge:

1. Do nothing.
2. Improve the highway without using the adjacent public park, recreational land, or wildlife and waterfowl refuge.
3. Build an improved facility on new location without using the public park, recreation land, or wildlife or waterfowl refuge.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. Do Nothing Alternative. The Do Nothing Alternative is not feasible and prudent because: (a) it would not correct existing or projected capacity deficiencies; or (b) it would not correct existing safety hazards; or (c) it would not correct existing deteriorated conditions and maintenance problems; and (d) not providing such correction would constitute a cost or community impact of

extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.

2. Improvement without Using the Adjacent Section 4(f) Lands.

It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in: (a) substantial adverse community impacts to adjacent homes, businesses or other improved properties; or (b) substantially increased roadway or structure cost; or (c) unique engineering, traffic, maintenance, or safety problems; or (d) substantial adverse social, economic, or environmental impacts; or (e) the project not meeting identified transportation needs; and (f) the impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

3. Alternatives on New Location

It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because (a) the new location would not solve existing transportation, safety, or maintenance problems; or (b) the new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing

of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas; or greater impacts to other Section 4(f) lands); or (c) the new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); and (d) such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when the officials having jurisdiction over the Section 4(f) property have agreed, in writing, with the assessment of impacts resulting from the use of the Section 4(f) property and with the mitigation measures to be provided. Mitigation measures shall include one or more of the following:

1. Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.
2. Replacement of facilities impacted by the project including sidewalks, paths, benches, lights, trees, and other facilities.

3. Restoration and landscaping of disturbed areas.
4. Incorporation of design features (e.g., reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts); and habitat features (e.g., construction of new, or enhancement of existing, wetlands or other special habitat types); where necessary to reduce or minimize impacts to the Section 4(f) property. Such features should be designed in a manner that will not adversely affect the safety of the highway facility. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during such design.
5. Payment of the fair market value of the land and improvements taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land and improvements taken.
6. Such additional or alternative mitigation measures as may be determined necessary based on consultation with the officials having jurisdiction over the parkland, recreation area, or wildlife or waterfowl refuge.

If the project uses Section 4(f) lands that are encumbered with a Federal interest (see Applicability), coordination is required with the appropriate agency to ascertain what special measures to minimize harm, or other requirements, may be necessary under that agency's regulations. To the extent possible, commitments to accomplish such special measures and/or requirements shall be included in the project record.

Coordination

Each project will require coordination in the early stages of project development with the Federal, State and/or local agency officials having jurisdiction over the Section 4(f) lands. In the case of non-Federal Section 4(f) lands, the official with jurisdiction will be asked to identify any Federal encumbrances. Where such encumbrances exist, coordination will be required with the Federal agency responsible for the encumbrance.

For the interests of the Department of Interior, Federal agency coordination will be initiated with the Regional Directors of the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation; the State Directors of the Bureau of Land Management; and the Area Directors of the Bureau of Indian Affairs. In the case of Indian lands, there will also be coordination with appropriate Indian Tribal officials.

Before applying this programmatic evaluation to projects requiring an individual bridge permit, the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

Copies of the final written analysis and determinations required under this programmatic Section 4(f) evaluation shall be provided to the officials having jurisdiction over the involved Section 4(f) area and to other parties upon request.


Approval Procedure:

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of the publicly owned public park, recreation area, or wildlife or waterfowl refuge) are clearly applicable to the project;
4. Determined that the project complies with the Measures to Minimize Harm section of this document;
5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;
6. Assured that the measures to minimize harm will be incorporated in the project; and
7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on: 12/23/86

Approved: _____


Ali F. Sevin, Director
Office of Environmental Policy
Federal Highway Administration